91-1391

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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

RAY PATTON Petitioner,

against

STATE OF OHIO Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE LUCAS COUNTY, OHIO COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of Petitioner's due process rights as well as rights under the Sixth Amendment to the United States Constitution for a jury commission to excuse prospective jurors for a prospective panel of jurors for a Petitioner's criminal case, where such excuses are granted outside the constraints and parameters of Ohio Revised Code § 2313.12, et al.,and where Petitioner's counsel has not acceded to such requests, and wherein said excused jurors could potentially form part of a prospective panel in Petitioner's case?

2. Is it in compliance with the Fifth Amendment and other provisions of the United States Constitution for a defendant to be convicted on both rape charge as well as attempted rape charge in circumstances wherein the victim has been sexually assaulted in the form of consummated sexual intercourse in conjunction with sexual acts leading to sexual intercourse under circumstances

wherein the acts occur within one room over a time space of approximately one hour, and wherein the assailant's acts leading to consummated sexual intercourse are aborted acts of a similar sexual nature, but not consummated?

3. Is it a denial of Petitioner's rights under the United States Constitution to convict him of rape and attempted rape under the Ohio Revised Code Section 2907.02 where the only physical evidence linking Petitioner to the rape is the alleged Petitioner's fingerprint on a mirror located in the same room as where the rape occurred, coupled with evidence that the assailant touched the mirror at or near the time of the incident, along with Petitioner's skin color matching the identification by the victim of the alleged Petitioner's skin color?

4. Is it a denial of Petitioner's due process rights for a court to refuse to grant access or admit victim's statement in evidence (to the Complainant's statement) made to the Police De-

partment about the alleged criminal violations herein, said statement being requested by Petitioner at the close of the direct testimony of Complainant pursuant to Criminal Rule 16(B)(6) where there are inconsistencies in the victim's versions?

5. Is it a denial of Petitioner's due process rights (pursuant to Ohio Revised Code Section 2945.25(A) and other relevant constitutional provisions) to convict and sentence separately a Petitioner of separate counts of rape under Ohio Revised Code Section 2906.02 under the circumstances wherein the assailant (purported to be Petitioner) has vagainal intercourse with the victim, withdraws before culmination, and resumes vaginal intercourse with the victim after a period of a few minutes (all within the same location?

6. Is Petitioner entitled to a reasonable delay between the completion of trial in a felony criminal case and sentencing in order to confer with counsel and said sentencing should not be

conducted without the benefit of victim impact statement under Ohio Revised Code Section 2945. 051?

7. Is it prejudicial error, in a felony rape trial to refuse to exclude, upon Petitioner's motion in limine, fingerprints of Petitioner, in circumstances wherein such fingerprints of Petitioner, presented as known prints, are extracted and utilized without a probable cause basis pursuant to constitutional standards?

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By reason of the foregoing, Petitioner's constitutional rights to a fair trial have been denied.

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In The

SUPREME COURT OF THE UNITED STATES

October, 1990 Term

RAY PATTON

Petitioner,

vs.

STATE OF OHIO,

Respondent

On Petition For A Writ Of Certiorari To The
Ohio Supreme Court

PRAYER

JURISDICTIONAL BASIS FOR RELIEF
CITATION OF REPORTED CASES

Petitioner prays that the Writ of Certiorari be granted herein for the reasons stated below. Jurisdiction of this matter is advanced pursuant to 28 U.S.C. 1257. All decisions below are unreported and are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner (Defendant) was charged with Aggravated Rape (Ohio Revised Code Section 2907.02), Attempted Rape (Ohio Revised Code Section 2923.02), and Breaking and Entering (Ohio Revised Code Section 2911.13) for a purported rape that occurred in Toledo, Ohio on September 9, 1988 in a residential dwelling (which dwelling was immediately adjacent to Petitioner's mother's home). Petitioner entered a not guilty plea at the trail court level and the matter, after numerous pretrial motions, was tried before a jury on January 20, 1989 in the Lucas County Common Pleas Court.

At the trial of the subject case, the following evidence was adduced in the prosecution's case-in-chief against Petitioner. First, the Complainant-Victim testified that a man entered her home (and subsequently forced intercourse, both vaginal and anal, on her) without her permission in the early morning of the date in question. She testified that her face was covered

by her assailant upon his initial encounter with her, such that she was not able to identify the assailant. This Complainant was not able to see the intruder, except for a glimpse of his skin on his arm, which she testified as being black. Complainant described her assailant as being between 5-8 to 5-10 in height, and not having a beard (but rather a day or two of beard growth), having allegedly detected this when she was kissed by the intruder. The only other feature testified to by the victim of the alleged assailant was that he had a rather low voice. Complainant was not able to otherwise identify the perpetrator and could not identify the Petitioner as her attacker. The victim also stated that the perpetrator had taken credit cards, cash, and a bottle of whiskey when he left the premises, and further stated that the assailant touched a mirror in the living room when he was about to leave the premises.

A medical record custodian witness testified that the Complainant appeard at the hospital

shortly after the attack, and introdued evidence of the medical records that were made when the victim went to the hospital shortly after the attack. The only evidence contained, or presented, as reflected in the medical records was the presence of semen that was not tied in to Petitioner (or any person as no DNA testing was consummated). In fact, none of the components of the rape kit were tied to Petitioner.

The victim's brother testified that after the event, during darkened morning hours (several hours after the incident), he saw a man that appeared to be the Petitioner, enter the house adjacent to that of the victim with an object tucked under his shirt. The adjacent house was that of Petitioner's mother.

Additionally testifying for the State was Officer Marok of the Toledo Police Department, who testified, over Petitioner's objection, that two latent fingerprints were lifted from the mirror, and that they purported to match Petitioner's

known fingerprints. Extensive cross-examination by Petitioner's counsel centered on the noticeable difference between the latent prints and the known prints of Petitioner, plus the poor quality of the latent prints (among other facts). The foregoing was the main thrust of the State's case-in-chief.

On the other hand, Petitioner's evidence comprised, in general, the following. First, Petitioner testified that he did not commit the act and that he was not staying at his mother's house at the time. Petitioner, who wore a fairly full beard, stated he had the same beard length before the date of the alleged incident. This aspect (of Petitioner's prior full beard length) was corroborated by various witnesses for Petitioner at trial.

Moreover, Petitioner testified he was 6-2 in height and this was not refuted at trial (this testimony was elicited by reason of the fact that the Complainant indicated at trial that her assail-

ant was 5-8 to 5-10 in height). Other witnesses testified that the Petitioner had a full beard (i.e., basically the same beard length that Petitioner had at trial) and that his beard length was about the same length at the time or around September, 1988.

Petitioner's expert on fingerprinting, Mr. A. J. Szgeti, testified that the latent fingerprints were not those of Petitioner, after making a comparison between the known prints and the latent fingerprints, stating that there were noticeable differences between the two sets.

Moreover, Petitioner's sister testified that she had, as a matter of practice for several months, drove him in her car from the place where he lived (some several miles from the location of the alleged incident herein) to transport him to work. She testified, as was her usual practice, that she picked up Petitioner on the day of the incident, about mid-day, at where Petitioner was living, at this same distal location and trans-

ported him to work.

The Prosecution then had Officer Keifer testify (subsequent to Petitioner's objection) on rebuttal mainly concerning his alleged opinion on the similarity between the latent and known prints, in addition to other rebuttal testimony.

After several hours of deliberation, the jury returned a verdict of guilty as to all counts of the indictment, and Petitioner was sentenced immediately by the Court (over Petitioner's objections).

Prior to the trial in this matter, Petitioner filed several pretrial motions, some of which were the subject of evidentiary hearings.

Petitioner filed an appeal to the Lucas County Court of Appeals, which Court affirmed the trial court (See Appendix A). An appeal was then taken to the Ohio Supreme Court, and this appeal right was denied (See Appendix B).

REASONS FOR GRANTING THE WRIT

I.

IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS AS WELL AS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR A JURY COMMISSION TO EXCUSE PROSPECTIVE JURORS FOR A PROSPECTIVE PANEL OF JURORS FOR A PETITIONER'S CRIMINAL CASE, WHERE SUCH EXCUSES ARE GRANTED OUTSIDE THE CONSTRAINTS AND PARAMETERS OF OHIO REVISED CODE § 2313.12, ET AL., AND WHERE PETITIONER'S COUNSEL HAS NOT ACCEDED TO SUCH REQUESTS, AND WHEREIN SAID EXCUSED JURORS COULD POTENTIALLY FORM PART OF A PROSPECTIVE PANEL IN PETITIONER'S CASE.

At the beginning of the trial in this matter, Petitioner moved to set aside the jury array for the reason that the manner of selecting the jury array did not comport with the applicable requirements of the Ohio Revised Code. Specifically, Petitioner advanced such motion for the reason that there was not proper compliance with the requirements of Ohio Revised Code § 2313.12 and § 2313.16. These specific code sections provided as follows:

O.R.C. § 2313.12:

"If a prospective juror fails to

attend as specified in the notice referred to in section 2313.10 of the Revised Code, for any cause except physical disability, or if he refused to be sworn, or to answer any legal and pertinent question put to him by a commissioner of jurors, such fact shall be reported by the commissioner to the court and such person shall be dealt with as for contempt of court. One or more successive notices may be served upon the same person when he fails to attend as required by the former notice and he shall be liable to punishment as for contempt of court for each failure to attend. A commissioner may dispense with the perosnal appearance of a person so notified, when another person cognizant of the facts is produced and testifies in his stead. When a person has so attended twice for examination, he cannot be required to attend again in the same jury year."

O.R.C. § 2313.16:

"Except as provided in section 2313.13 of the Revised Code, the court of common pleas shall not excuse a person, liable to serve as a juror and drawn and notified, unless it is shown to the satisfaction of the judge by either the juror or another person acquainted with the facts, that:

(A) The juror is then necessarily absent from the county and will not return in time to serve;

(B) The interests of the public, or of the juror, will be materially injured by the juror's attendance;

(C) The juror is physically unable

> to serve;
>
> (D) The juror's spouse, or a near relative of the juror or the juror's spouse, has recently died or is dangerously ill;
>
> (E) The juror has been called as a juror for trial in a court of record in the county within the same jury year.
>
> When a person liable to serve is excused, in a case specified in this section, or when a person notified to attend a term as a juror is entitled to and claims an exemption, the juror can be excused only by the judge presiding or a representative of the judge. Such an excuse shall not extend beyond that term. Every approved excuse shall be recorded and filed with the jury commissioners."

The above sections provide the means by which jurors should be excused from jury service (i.e. from being on the basic panel). Under Ohio Revised Code § 2313.16, as stated above, no juror shall be excused from service unless certain requirements are complied with, namely, that the reasons for the excuse fall within one of the designated categories set forth in this latter section of the code.

In this situation, it was testified to by Mrs. Ritter, the acting jury commissioner clerk of the Lucas County Common Pleas Court, from the jury poll

of 150 (from which Petitioner's jury was drawn herein) that one student's mother had called before the trial and asked that her daughter be excused and was excused. Also, Charlotte Martinez, the jury clerk testified that a minimum of 20 jurors out of 100 called as to this basic panel, were excused over the telephone. It was further testified to that of these 20 that were so excused, this represented at least 20% of the jurors that were excused (not in open court). It was indicated that there were some automatically excused for being over 70 years of age. Yet O.R.C. § 2313.16 does not provide for such an excuse right (i.e. for being over 70 years old). Mrs. Ritter stated that as many as 35% are excused by telephone calls. Mrs. Ritter also indicated that many of these people were excused for such things as attending law school classes, having young children under the age of 6, etc.

The prejudice involved in this situation is that the Petitioner's right to a fair and impar-

tial jury trial as mandated by the Sixth Amendment to the United States Constitution is seriously inpaired, since the selection process is no longer random (as required by O.R.C. § 2313.07), but is rather a matter of the arbitrary and independent judgment of a person in the jury commissioner's office, and without complying with O.R.C. § 2313.16. There is no record of the race, background or other facts of the people who are so excused such that Petitioner can determine the viability of such an excuse. In short, Petitioner cannot and did not have the ability to participate in this process.

Furthermore, notwithstanding the constitutional question, there is the existence of a statutory requirement for the selection of jurors. It behooves the State to adhere to the law just as much as the Petitioner or other citizens who are brought to task for allegedly violating the law. This aspect of similar burdens has been recognized by certain Ohio courts. See, for ex-

ample, State v. Davis; 60 O. App. 2d 355 - in which it was held that an indictment was void where prospective jurors were excused in a manner not in conformance with the parameters of Ohio Revised Code § 2313.17.

The question of racial composition of a petit jury was addressed in State v. Roe (41 O.S. 3d 18, 535, N.E. 2d, 1351; 1989) with the holding that a petit jury need not reflect the racial or other composition of a community, however, it is the position of Petitioner that the challenged procedure detracts from Petitioner's ability to help participate in the jury selection process. A defect in the selection process taints the procedure and is clearly unconstitutional under the Sixth Amendment of the United States Constitution. The United States Supreme Court had addressed this issue and has held that the traditional appropriation in this county contemplates a jury drawn from a cross section of the community, and that the right to an impartial jury necessarily

encompasses a selection process without systematic exclusion of any group of persons. (See, for example, Fay v. New York; 332 U.S. 261; 91 L.Ed. 2024; 67 S. Ct. 1613, reh denied 332 U.S. 784). (See also Hoyt v. Florida; 368 U.S. 57, 7 L.Ed 2d 118, 82 S. Ct. 159). The Supreme Court has stated that the mode of the jury selection process must be examined in order to determine whether there is some rational basis for exclusions. (See Smith v. Texas; 311 U.S. 128; 85 L.Ed 84; 61 S. Ct. 1684)

II

A DEFENDANT SHOULD NOT BE CONVICTED ON BOTH RAPE CHARGE AS WELL AS ATTEMPTED RAPE CHARGE IN CIRCUMSTANCES WHEREIN THE VICTIM HAS BEEN SEXUALLY ASSAULTED IN THE FORM OF CONSUMMATED SEXUAL INTERCOURSE IN CONJUNCTION WITH SEXUAL ACTS LEADING TO SEXUAL INTERCOURSE UNDER CIRCUMSTANCES WHEREIN THE ACTS OCCUR WITHIN ONE ROOM OVER A TIME SPACE OF APPROXIMATELY ONE HOUR, AND WHEREIN THE ASSAILANT'S ACTS LEADING TO CONSUMMATED SEXUAL INTERCOURSE ARE ABORTED ACTS OF A SIMILAR SEXUAL NATURE, BUT NOT CONSUMMATED.

As a point of departure, Ohio Revised Code § 2941.25(A) provides as follows:

> "(A) Where the same conduct by Defendant can be construed to constitute two or or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

In this respect, as can be seen, the foregoing section is structured to prevent multiple convictions arising from a relatively singular incident, even though charged as separate counts. The instant case involves a situation closely analogous to that presented in State v. Donald; 57 O. St. 2d 73; 1979. In that case, the defendant had forced

a woman from one room into another where the defendant raped her. The Ohio Supreme Court held that since the Defendant had acted with but single animus, the kidnapping was incidental to the rape, and the two offenses were accordingly "merged" by operation of Ohio Revised Code § 2941.25(A), and the defendant could only be convicted for one of them, pursuant to that statute, even though charged with mutiple offenses. In connection with this latter provision of the Code, while the jury may be required to determine the guilt or innocence with respect to each count where separate offenses alleged are of similar import, an accused may be convicted of only one of those offenses, so long as the evidence discloses that the accused commited said offenses concurrently, with but a single animus. (See e.g. State v. Brown; 7 O App. 3d 113 at 116-117; 1982) (See also State v Ware; 63 O.S. 2d 84).

In this latter light, the Ohio Supreme Court ruled in State v. Price, 60 O.S. 2d 136, that a

rape conviction and a kidnapping conviction are allied offenses of similar import within the context of Ohio Revised Code § 2941.25 and cannot be punished by a plurality of sentences in circumstances where they are not connected separately and not with a separate animus.

The only testimony in this case that is really relevant to this issue is that of the victim. The victim testified that the assailant ordered her to go downstairs, and that when they were downstairs, the assailant attempted to have anal sex with her, and then subsequently the assailant had vaginal sex with her, and thereafter the assailant withdrew his penis from the victim, apparently without culmination of the act, and thereafter the assailant again re-entered the victim's vagina. The only apparent interruption was when the assailant obtained some whiskey and pured it on the victim's breasts. All these events, as the evidence was adduced, appeared to have occurred over a period of less than one hour

in a single room.

It thus appears clear from this testimony that the assailant had acted with singular animus and that in reality only one act of rape occurred, by whomever perpetrated it, and that the offenses all are of similar import. Equally important is the fact that they all occurred within a relatively short time frame, within a single room, and the victim was situated in one location of the room where it occurred, without being moved. The victim indicated that there was an attempt at anal intercourse that was immediately aborted at her request, with brief vaginal intercourse (where the assailant apparenlty did not culminate the act but withdrew prior to such culminaiton), and then the assailant re-entered the victim's vagina within a matter of a few minutes and culminated the act.

The thrust of Petitioner's argument herein is viewed from yet another perspective, that of the double jeopardy clause of the Fifth Amendment to

the United States Constitution. In this respect, the double jeopardy clause applies irrespective of whether the charges and convictions result from a singular trial. Moreover, the double jeopardy clause proscribes successive prosectuion and cumulative punishment for a greater and lesser included offense. (See Brown v. Ohio; 53 L. Ed 2d, 187; 97 S. Ct. 2221).

III

IT IS A DENIAL OF PETITIONER'S RIGHTS UNDER THE UNITED STATES CONSTITUTION TO CONVICT HIM OF RAPE AND ATTEMPTED RAPE UNDER THE OHIO REVISED CODE SECTION 2907.02 WHERE THE ONLY PHYSICAL EVIDENCE LINKING PETITIONER TO THE RAPE IS THE ALLEGED PETITIONER'S FINGERPRINT ON A MIRROR LOCATED IN THE SAME ROOM AS WHERE THE RAPE OCCURRED, COUPLED WITH EVIDENCE THAT THE ASSAILANT TOUCHED THE MIRROR AT OR NEAR THE TIME OF THE INCIDENT, ALONG WITH PETITIONER'S SKIN COLOR MATCHING THE IDENTIFICATION BY THE VICTIM OF THE ALLEGED PETITIONER'S SKIN COLOR.

Petitioner contends that there is insufficient evidence to sustain a verdict of guilty of each and every count of indictment herein. Specific analysis of the evidence in this respect reveals that the only evidence that was offered by the prosecution that purports to allegedly link Petitioner as the assailant was the fingerprint evidence (on the mirror in the room where the rape occurred) adduced by the prosecution over Petitioner's objection.

First, as a basic point of departure, O.R.C. § 2907.02 provides in relevant part as follows:

"....

> (2) No person shall engage in sexual contact with another when the offender purposely compels the other person to submit by force or threat of force."

This section requires proof of sexual conduct. When the offender "purposely compels another to submit by force", at issue in the trial of this case was the identity of the perpetrator and the further questions of whether there was sufficient proof of (1) purposely compelling the victim to submit, and (2) whether there was the requisite proof involved. Petitioner maintains that there was not sufficient proof in this regard, and the following general legal standards on the question of sufficiency of evidence, through constitutional perspectives and otherwise, support this position of Petitioner in this regard.

In Ohio, a conviction cannot be based upon circumstantial evidence, unless such circumstantial evidence is bound to be totally irreconciable with any rationale theory of innocence (State v. Kulig; 37 O. St. 2d 157 at 160; 1974) (State v. Sorgee; 564 O. St. 2d 464; 1978) (State v. Franks;

61 O. App. 2d 51; 1979) (State v. Ebright; 11 O. App. 3d 97; 1983). This latter aspect of law as found in State v. Kulig, supra, has been found to apply where the evidence relative a single element of the offense is circumstantial, and there exists a reasonable hypothesis of innocence which would tend to be or be likely to negate the existence of that particular element of the offense. (See State v. Griffin; 13 O. App. 3d 376 at 377; 1979).

In State v. Graven; 54 O. St. 2d, 114 at 118; 1978, the Ohio Supreme Court ruled on this question in the following terms:

> "....it is axiomatic that criminal conduct may be, and in many instances, can only be proved by circumstantial evidence. However, the circumstantial evidence relied upon to prove an essential element of the crime must be irreconcilable with any reasonable theory of innocence in order to support a finding of guilty." State v. Kulig; 37 O. St. 2d 157 (1974).
>
> Thus, where circumstantial evidence is relied upon to prove elements of the crime, as in the cause sub judice, the jury must find it to be of such conclusive and persuasize force that it excludes every reasonable hypothesis of innocence."

The inveterate requirement of proof beyond a reasonable doubt in a standard criminal case is codified in Ohio Revised Code § 2901.05(A) and is a constitutional component of due process made applicable to the states by operation of the Fourteenth Amendment to the United States Constitution (In Re Winship; 397 U.S. 358; 1967).

Further, in Jackson v. Virginia; 443 U.S.307; 1979, the United States Supreme Court ruled that in order to sustain a criminal conviction, due process requires that the evidence as to each element of an offense as defined by state law must be supported by evidence of sufficient quality and probative force to enable a rational trier of fact to conclude that proof beyond a reasonable doubt has been established. Where the evidence is such that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, a conviction cannot constitutionally be upheld.

In this particular case, the alleged fingerprint evidence was found on the mirror in the

house purportedly in the same room in which the alleged rape occurred. Aside from Petitioner being a black person (the victim described her assailant's skin as black) and having a low voice, there is absolutely nothing in the way of evidence to link Petitioner with the purported rape of the victim in this case. Under the Test of Jackson v. Virginia; 443 U.S. 307; 1979, as indicated above, the proof in this situation is not of a sufficient quality and probative value that a jury could decide the guilty verdict beyond a reasonable doubt. A single fingerprint (or possibly 2) is not sufficient proof that Petitioner had in fact committed the alleged rape (i.e. engaged in sexual conduct with the victim), nor does it prove that Petitioner acted "purposely" to compel the victim. This fingerprint evidence, or other evidence, was not on victim's person, nor was it on the victim's clothes. In fact, there was no evidence on the victim or the victim's clothing that would link Petitioner to the alleged sexual

or other contact with the victim. Further, there was no evidence of violence or physical harm inflicted upon the victim. The only evidence consists of the victim's testimony and the fingerprints.

Most significant in this latter respect is the fact that the victim went to the hospital immediately after the incident, and a "rape kit" was constructed. This rape kit, which eventually was entered into evidence as State Exhibit Number 1 contained absolutely not one iota of physical evidence that was linked to Petitioner. In fact, a semen sample was taken, yet even in the contemporaneous circumstances of present-day forensic science, where DNA testimony of semen can be used to generate genetic comparisons, the testimony revealed no such comparison testing was consummated in this matter, even though the opporutnity admittedly existed. Thus, there was no blood, semen, hair particles, clothing strands, or other physical evidence that connected Petitioner to the

incidents in question.

Under such circumstances, there was not sufficient proof linking Petitioner to the incidents in question in this matter. There is no proof, by the existence of these purported fingerprints that the Petitioner engaged in sexual conduct with the victim. The evidence is consistent with innocence. (See also Carella v. California; 109 S. Ct. 2419 (1989).

IV

IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS FOR A COURT TO REFUSE TO GRANT ACCESS OR ADMIT VICTIM'S STATEMENT IN EVIDENCE (TO THE COMPLAINANT'S STATEMENT) MADE TO THE POLICE DEPARTMENT ABOUT THE ALLEGED CRIMINAL VIOLATIONS HEREIN, SAID STATEMENT BEING REQUESTED BY PETITIONER AT THE CLOSE OF THE DIRECT TESTIMONY OF COMPLAINANT PURSUANT TO CRIMINAL RULE 16(B)(6) WHERE THERE ARE INCONSISTENCIES IN THE VICTIM'S VERSIONS.

At the conclusion of the direct examination of Complainant, Petitioner's counsel requested a copy of Complainant's pretrial statement in order to cross-examine the Complainant therein. This request was advanced pursuant to Criminal Rule 16(B)(6) on the basis that there were inconsistencies between the direct testimony of Complainant and such pretrial statement.

In this respect, Criminal Rule 16(B) provides in relevant part as follows:

> "(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and

> participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement...."

It is clear that if such inconsistencies exist, it appears mandatory that Petitioner's counsel be given a copy of the statement for use in cross-examining the witness, and the entire statement must be given even if there is only one inconsistency in the statement. Moreover, if the statement is not given to the defendant, it must be preserved for purposes of appeal.

The Supreme Court of Ohio has declared that such statement must be provided under the Criminal Rule provision even if the inconsistencies are not established until the Petitioner's cross-examination process. (State v. White (15 O.S. 2d 146; 1968).

In this situation, the motion was made at the close of the prosecution's case and the motion was denied, yet counsel for Petitioner ascertained and pointed out areas of inconsistency, before and during cross-examination, as specifi-

cally delineated in the Trial Transcript. Defense counsel pointed out to the Court that there were apparent discrepancies between what the witness stated about how tall the assailant was and statements made by the victim that the assailant believed her to be living alone, and these apparent inconsistencies were stressed to the Court, yet the Court would not allow such statements to be given to Petitioner's counsel for cross-examination. (Moreover, after overruling such motion, the Court did not enter the document into evidence.)

In this respect, two Ohio Courts of Appeals have ruled most recently that prosecuting witness statements comprise public records under O.R.C. Section 149.43 (and presumably are available to defense counsel or other interested participants). (See Stanford v. Relly; 541 NE 2d 124; 44 O. App. 2d 30; 1989 Clark Cty.) (Also see State ex rel National Broadcasting Co. v. Cleveland; 38 Ohio App. 3d 79; 526 NE2d 789 Cuyahoga County Court of Appeals).

It is the position of the Petitioner that he should not only have been given an opportunity to cross-examine on the statement,but more importantly, have been given the right to have the statement placed in evidence. Petitioner urges that under the recent authority - trend of these two latter Court of Appeals cases, denial of the right of cross-examination and denial of admission thereof into evidence, seriously violates Appellant's rights under the Constitution, particularly the Sixth Amendment. Clearly, why should a prosecution witness' statement be treated more sacrosanctly than that of defense witnesses. There can be no disparity and thus must be remedied.

V

IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS (PURSUANT TO OHIO REVISED CODE SECTION 2945.25(A) TO CONVICT AND SENTENCE SEPARATELY A PETITIONER OF SEPARATE COUNTS OF RAPE UNDER OHIO REVISED CODE SECTION 2906.02 UNDER THE CIRCUMSTANCES WHEREIN THE ASSAILANT (PURPORTED TO BE PETITIONER) HAS VAGINAL INTERCOURSE WITH THE VCITIM, WITHDRAWS BEFORE CULMINATION, AND RESUMES VAGINAL INTERCOURSE WITH THE VICTIM AFTER A PERIOD OF A FEW MINUTES (ALL WITHIN THE SAME LOCATION).

Ohio Revised Code § 2941.25(A) provides as follows:

> "(A) Where the same conduct by Defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

Additionally, Ohio Revised Code § 1931.14(B) provides as follows:

> "Where the defendant's conduct constitutes two (2) or more offenses of dissimilar import, or where hie conduct results in two (2) or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

As can be seen, these latter sections clearly indicate that where the conduct of the perpetrator constitutes two or more offenses of .... of the same or similar kind committed with the same animus as to each, then the Petitioner cannot be convicted separately and sentenced separately. The key, in this respect, is the singular animus.

In this latter respect, there is evidence adduced to the effect that the perpetrator had vaginal intercourse with the victim for about five (5) minutes, thereafter withdrawing before culmination. A second vaginal penetration was then undertaken shortly after the first act of penetration (apparently without culmination) after the perpetrator apparently obtained a bottle of whiskey in the victim's home and drank some and then poured whiskey on the victim's chest, but this occurred within a time frame of a few minutes after the first act of vaginal penetration. Thereafter, the assailant had resumed vaginal intercourse with the victim and apparently culminated the act. All this occurred within a time period of apparently less

than one hour within the confines of a single room. From the onset of the first sexual assault committed by the assailant to the last act, the victim was in a singular location and was not moved about, nor was there evidence of any apparent motivation on the part of the assailant other than sexual gratification. The assailant did not culminate the act during the first vaginal penetration, but upon culminating the act after the second sexual penetration did so apparently culminate the act, and thereupon left from the victim's house. There was no evidence adduced as to a motivation, animus, or otherwise,aside from the apparent quest for sexual gratification. There was no such evidence of multiple animus.

In this light, attention is addressed to State v. Ware; 53 O. App. 2d, 210; 372 N.E. 2d 1367) - entries into two body cavities were considered separate rape offenses of a different kind. (See also State v Kent; 68 O. App 2d 151; 429 N.E. 2d, 453) See also State v. Abi-Sarks; 41 O. App. 2d,

333, 535 N.E. 2d 745). Additional references made to State v. Earich; 4 O. App 3d 183; 447 N. E. 2d 121 - a conviction of gross sexual imposition under O.R.C. § 2907.05(A)(1) and one attemped rape under 2923.02(A) are allied offenses of similar import and cannot be punished with multiple convictions or sentences.

VI

PETITIONER IS ENTITLED TO A REASONABLE DELAY BETWEEN THE COMPLETION OF TRIAL IN A FELONY CRIMINAL CASE AND SENTENCING IN ORDER TO CONFER WITH COUNSEL AND SAID SENTENCING SHOULD NOT BE CONDUCTED WITHOUT THE BENEFIT OF VICTIM IMPACT STATEMENT UNDER OHIO REVISED CODE SECTION 2945.051.

The last day of the trial of the subject case consumed a full day, and the jurors deliberated until approximately 9:00 P.M. Immediately after announcement of the verdict, the court indicated it would proceed to sentencing. Petitioner's counsel stated that he was not prepared on such short notice to enter into the sentencing stage. Notwithstanding this objection, the Court ordered the sentencing to proceed, and while there was opportunity to speak on behalf of the Petitioner, counsel was simply not prepared on this short notice to discuss sentencing aspects. More importantly, defense counsel was quite fatigued from a lengthy trial, coupled with a final day of trial extending to about 9:30 P.M. in the evening.

It is the contention of Petitioner that such

sentencing procedure should have been conducted at a time separated from the termination of the trial, and other than just immediately after the completion of the trial. As stated, Petitioner's attorney was completely exhausted after a three-day trial, with the final day being rather lengthy. It was not feasible for Petitioner's counsel to argue on Petitioner's behalf relative to the sentencing alternatives because of this state of fatigue (mental and physical) and this aspect coupled with the lack of adequate time to prepare (and talk to Defendant), thrust Petitioner into a prejudicial situation so that his due process rights under the United States Constitution were thereby seriously jeopardized.

In regard to the sentencing procedure, it is incumbent upon the Court to ask Petitioner whether he has anything to state (Ohio Revised Code § 2947.05) (Ohio Revised Code §2947.06) and to hear a victim impact statement (Ohio Revised Code § 2947.051).

VII

IT IS PREJUDICIAL ERROR, IN A FELONY RAPE TRIAL TO REFUSE TO EXCLUDE, UPON PETITIONER'S MOTION IN LIMINE, FINGERPRINTS OF PETITIONER, IN CIRCUMSTANCES WHEREIN SUCH FINGERPRINTS OF PETITIONER, PRESENTED AS KNOWN PRINTS, ARE EXTRACTED AND UTILIZED WITHOUT A PROBABLE CAUSE BASIS PURSUANT TO CONSTITUTIONAL STANDARDS.

At page 308 of the trial, Petitioner moved in limine to restrict the prosecution from introducing into evidence any fingerprint evidence of the Petitioner for the reason that such prints were used without a probable cause standard in violation of Petitioner's constitutional rights, as more fully discussed below.

Specifically, the inviolate privilege against self-incrimination does not generally apply to fingerprint extraction. However, if the accused (Petitioner) has been improperly detained, the fingerprint evidence (obtained during such illegal detention) may not be admissible under Fourth Amendment parameters. In this context of Petitioner's motion, Petitioner thus sought limitation in the introduction of fingerprint and other physical

evidence (as well as verbal statements) that were obtained as a result of the arrest and/or detention of Petitioner. (This motion in limine was similar in substance to the motion to suppress filed by Petitioner and is somewhat redundant.)

This evidence sought to be excluded would all be excludable if such evidence were in fact obtained and/or used without viable probable cause basis as delineated in Mapp v. Ohio; 367 U.S. 643; 81 S. Ct. 1684.

Here the Petitioner was arrested without probable cause or basis, and apparently without a proper warrant for his arrest, and while Petitioner's prints were not obtained as a result of his arrest in this incident, they were obtained and used without a proper foundation, therefore, as gauged by the probable cause standard of Mapp v. Ohio, cited above. In this regard, the basis of obtaining the prints arose from a relatively spurious and ambiguous identification of Petitioner. Petitioner was supposedly identified by the victim's brother the following morning as having

been a person he observed enter the house next to the victim's house. The brother indicated nothing in his identification about the person, including color, size, build, facial features, etc. In fact, the only thing the brother appeared to see was the person looking about furtively with a cylindrical object tucked under his shirt. He was allegedly identified as the man.

Other than the above, there was no basis for allegedly or purportedly connecting Petitioner to the matter and without a proper foundation. There was no probable cause to extract or use Petitioner's prints in this matter.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to Dean P. Mandross, Prosecutor's Office, Common Pleas Court of Lucas County, Court House, Toledo, Ohio 43624 this 22 day of January, 1992.

John G. Rust
Counsel for Petitioner